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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In Re: ALL CASES	
THIS RELATES TO: All Dealership Actions All End Payor Actions	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO LIFT THE PROVISIONAL SEALING OF A PORTION OF THE RULE 30(b)(1) DEPOSITION OF GEORGE R. NISBET, THE CO-OWNER OF AUTO DEALER PLAINTIFF THORNHILL SUPERSTORE

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CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Fed. R. Civ. P. 26

Fed. R. Civ. P. 30

Conti v. Am. Axle & Mfg., Inc., 326 F. App'x 900 (6th Cir. 2009)

Resolution Trust Corp. v. Dabney, 73 F.3d 262 (10th Cir. 1995)

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ARGUMENT

The provisional seal on a portion of the testimony of Mr. Nisbet, co-owner of Auto Dealer Plaintiff Thornhill Superstore, Inc. should be lifted. The Court cannot allow Auto Dealers to block Defendants from discovering facts that are relevant to whether Thornhill was injured, the measure of Thornhill's damages, whether Thornhill is a typical and adequate class representative, and whether the putative class Thornhill seeks to represent can prove liability using common evidence by instructing a witness not to answer questions on the basis of "relevance" during a deposition.

Auto Dealers' Opposition fails to set forth any sound basis to prevent Defendants from discovering this relevant testimony under the broad standards for discovery in the Federal Rules. Auto Dealers argue that the Special Master's December 29, 2015 Order prohibits any questions based on a witness's prior testimony, if that testimony was taken in a class action. But the December 29 Order on Defendants' Rule 30(b)(6) notice does not set the scope for Rule 30(b)(1) depositions and, in any event, that order expressly recognized the relevance of questions concerning Auto Dealers' pricing, sales, and recordkeeping practices. Further, it was improper for Auto Dealers' counsel to instruct Mr. Nisbet not to answer questions based on "relevance," especially where the testimony elicited is directly relevant to the issues in this MDL.

I. AUTO DEALERS' ARGUMENT ABOUT THE SPECIAL MASTER'S PRIOR ORDER IS WRONG

The Special Master's December 29 Order does not (and was not intended to) block inquiry on relevant topics in a Rule 30(b)(1) deposition, including on topics that he specifically approved for Rule 30(b)(6) depositions, simply because the questions pertain to the witness's prior testimony in a class action. *See* Opp. at 1–5. The December 29 Order established only that Auto Dealers did not have to designate and prepare witnesses to testify about certain specific matters under Rule 30(b)(6). That ruling did not become the "law of the case" to *preclude* questions in a

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Rule 30(b)(1) deposition. But even if the December 29 Order had any relevance here, the subjects about which Mr. Nisbet was examined were clearly within the scope of other topics in the Rule 30(b)(6) notice that the Special Master approved.

The Special Master explicitly affirmed in his December 29 Order that Auto Dealers were required to designate witnesses to testify about sales, pricing, and recordkeeping practices. Although Auto Dealers clearly do not like Mr. Nisbet's testimony on those subjects (especially after he was confronted with the testimony he gave in prior proceedings), they do not argue that the testimony in the sealed portion of the deposition transcript did not deal with Thornhill's sales, pricing, and recordkeeping practice during the alleged class period. The mere fact that the prior testimony with which he was confronted was taken in a class action does not render it inadmissible (which is not, as discussed below, the standard for deposition discovery in any event) or improper. The December 29 Order cannot reasonably be read to allow examination about sales, pricing, and recordkeeping practices *unless* it involved statements made in the record of a prior lawsuit. Auto Dealers fail to respond to this argument at all, likely because they have nothing to say.

Auto Dealers instead argue that Defendants asked these questions for some improper motive. If, they argue, Defendants really were interested in Thornhill's pricing practices, Defendants "[redacted] Opp. at 11. But Defendants did not call the Special Master to [redacted] to do anything. Rather, they called the Special Master to ask that Auto Dealer counsel be directed to discontinue his improper obstruction of the deposition. Auto Dealers' counsel [redacted] Defs. Mot., Ex. 1, Unsealed Tr. at 241.

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Likewise, Auto Dealers' claim that Defendants made [redacted] Opp. at 13–14, is belied by the transcript itself, which shows that the reference to Thornhill's recordkeeping practices as a [redacted] Defs. Mot., Ex. 3, Sealed Tr. at 65:11–68:6. [redacted] *Id.* at 68:25–70:4. The examination, in fact, proceeded amicably after the Special Master directed that it continue under seal, with few objections thereafter.

Defendants' investigation of Thornhill's claims revealed that the dealership engaged in extensive litigation for nearly half of the alleged class period. Defendants went to the Circuit Court of Kanawha County, pulled the docket, discovered that Mr. Nisbet made statements in a sworn affidavit and in a deposition that undermine Thornhill's claims in this MDL, and confronted him with these past statements during his deposition. That is neither a "fishing expedition" nor "muck-raking." *See* Opp. at 4, 14. Failing to ask appropriate questions about known prior testimony concerning key issues might well be malpractice. Certainly, it is not precluded by the December 29 Order.

II. AUTO DEALERS' COUNSEL'S INSTRUCTIONS NOT TO ANSWER DEPOSITION QUESTIONS WERE ENTIRELY IMPROPER

Counsel's instruction to Mr. Nisbet not to answer questions based upon "relevance" was inappropriate and there is no legal basis to bar use of Mr. Nisbet's testimony. Depositions are viewed as such a crucial discovery tool that the Federal Rules provide that testimony should be taken subject to any objection, *see* Fed. R. Civ. P. 30(c)(2), absent a showing that the testimony so "unreasonably annoys, embarrasses, or oppresses" that a protective order should issue under Rule 26(c) or 30(d)(3). Instructing a deponent not to answer a question on relevance grounds is commonly viewed as sanctionable, *see, e.g.*, *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266

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(10th Cir. 1995), and barring deposition testimony on the basis of "relevance" alone may be reversible error, *see, e.g., Serrano v. Cintas Corp.*, 699 F.3d 884, 901–02 (6th Cir. 2012).

In order to bar Defendants from discovering information in a deposition—as Auto Dealers seek to do here by requesting that this deposition testimony remain sealed—Auto Dealers would have to show that the questions about Mr. Nisbet's prior testimony and a court's order concerning Thornhill's pricing, sales and recordkeeping practices so "unreasonably annoys, embarrasses, or oppresses" Mr. Nisbet that a protective order should issue under Rule 26(c) or 30(d)(3). Auto Dealers have failed to offer any such grounds to limit this testimony from Mr. Nisbet and fail even to mention the relevant Federal Rules of Civil Procedure that govern discovery.[1]

Instead, Auto Dealers devote much of their brief to arguing the entirely irrelevant question of whether Mr. Nisbet's deposition testimony would be *admissible at trial* under the Federal Rules of Evidence. Opp. at 1, 12–15. Putting aside that this testimony will be both relevant *and* admissible at any trial, Fed. R. Evid. 401 and 403 have nothing to do with the scope of what Defendants can discover through depositions, including whether they can examine a witness about his own prior testimony and a court order in prior litigation in which he was involved.[2] As Fed. R. Civ. P. 26(b)(1) itself plainly states, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *See also Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6th Cir. 1970) ("The scope of examination permitted under Rule 26(b) is broader than that permitted at trial.") Relevance for purposes of discovery "must be construed broadly to

[1] Auto Dealers' "waiver" argument concerning questions asked about the *Barker* litigation, Opp. at 15–16, is frivolous. Auto Dealers bear the burden of demonstrating why these questions should be prohibited.

[2] Nor does the Special Master's authority extend to issues of admissibility under the Federal Rules of Evidence. *See* Order Appointing a Master (2:12-cv-02311, ECF No. 792) (granting Special Master authority to resolve "discovery disputes . . . guided by the Federal Rules of Civil Procedure").

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encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case," so that each party can "obtain the fullest possible knowledge of the issues and facts before trial." *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 904, 907 (6th Cir. 2009) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The issue here is not whether Mr. Nisbet's testimony will be admissible at trial, but whether Auto Dealers can prevent Defendants from *discovering* this information at all. This question is not governed by the Federal Rules of Evidence, but by Rules 26(c) and 30(d)(3) of the Federal Rules of Civil Procedure, and this discovery is clearly permitted under those Rules.

III. THE PROVISIONALLY SEALED TESTIMONY IS HIGHLY RELEVANT

Even assuming that "relevance" were a proper objection to questions at a deposition, there was no good faith basis to assert that objection here, much less to instruct the witness not to respond. The testimony Defendants elicited from Mr. Nisbet in the portion of the transcript at issue is directly relevant to the merits of Thornhill's claims, Thornhill's alleged damages (including pass-on), whether Thornhill is a typical and adequate class representative, and whether the putative auto dealer class can prove impact using common evidence.

It is simply remarkable for Auto Dealers to argue that Mr. Nisbet's testimony is not discoverable because Defendants are required to look instead at "[redacted] Opp. at 6. Setting aside the fact that the DMS data that the Auto Dealers have produced is riddled with errors,[3] the notion that Defendants are *prohibited* from using prior testimony of a witness to establish that the data is *wrong* is absurd.

[3] *See, e.g.*, Defs. Mot. to Compel Auto Dealers to (1) Comply with the May 12 Order and (2) Discontinue Obstruction of Third-Party Discovery (2:12-cv-00102, ECF No. 335).

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[redacted] These unique practices are among the "real world" facts that other courts have held makes class certification in the auto industry impracticable. *In re Class 8 Transmission Indirect Purchaser Antitrust Litig.*, Civ. No. 11-00009-SLR, 2015 WL 6181748, at *10 & n.14 (D. Del. Oct. 21, 2015).

Thus, Mr. Nisbet clearly testified in the provisionally sealed portion of the transcript [redacted] Defendants are not required to rely on Thornhill's (or any other Auto Dealer's) DMS data. They are entitled to take discovery to establish—as they are doing in deposition after deposition—that the DMS data Auto Dealers have produced are not only grossly incomplete, but *wrong*.[4] Certainly, where the

[4] *See, e.g.*, Ex. 1, Dep. of Auto Dealer Pltf. Landers McLarty Lee's Summit, Mo. L.L.C. (Feb. 17, 2016) ("Lee's Summit") at 226:10–227:21 [redacted]

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Auto Dealers [redacted] Defendants have the right to discover that fact. Nothing permits Auto Dealers to conceal the truth by instructing Mr. Nisbet not to answer questions under the guise of "relevance."

Auto Dealers also argue that Mr. Nisbet's sealed testimony will not be enough to establish that Thornhill is not an adequate class member or that its claims are not typical, Opp. at 8–10, but once again they confuse discoverability of information with the factual and legal questions that will be decided later by the Court or by juries. Auto Dealers admit that credibility will be a factor in determining Thornhill's adequacy as a class representative, Opp. at 9, and typicality will be part of the "rigorous analysis" required to ensure that Thornhill's claims will be a reliable indicator of the claims of the members of the putative class. *See In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078–79 (6th Cir. 1996). If Thornhill's sales records [redacted], there is no reason they should be used to represent the sale prices of other auto dealers. Therefore, questions about Thornhill's pricing and sales practices, including whether Thornhill falsified its sales records, are not [redacted] but are directly relevant to class certification. Opp. at 8. Auto Dealers may someday argue to Judge Battani that Thornhill's sales practices and falsified records do not prevent it from adequately representing a class, but that is not the standard by which the permissible range of questions at a *deposition* is measured. Auto Dealers have no right to block *discovery* of this information in the first instance, regardless of their view of its ultimate sufficiency.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the provisional seal on a portion of the transcript of Mr. Nisbet's deposition be lifted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2016, I caused the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO LIFT THE PROVISIONAL SEALING OF A PORTION OF THE 30(B)(1) DEPOSITION OF GEORGE R. NISBET, THE CO-OWNER OF AUTO DEALER PLAINTIFF THORNHILL SUPERSTORE** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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